

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PEDRO FERNANDEZ,

Defendant-Appellant.

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UNPUBLISHED

October 2, 1998

No. 200980

Lenawee Circuit Court

LC No. 96-006914 FH

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to two to six years' imprisonment. We affirm.

Defendant first argues that the trial court should have sua sponte instructed the jury on the use of non-deadly force in self-defense, CJI2d 7.22. We disagree. Jury instructions are reviewed by this Court in their entirety to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Jury instructions must be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, jury instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id.* Here, in the absence of an objection or request for CJI2d 7.22, the trial court did not err by failing to sua sponte give that instruction. Defendant's rights were adequately protected by the general self-defense instruction given by the trial court regarding the use of deadly force. The trial court fairly presented to the jury the issues for trial and sufficiently protected defendant's rights. *Piper, supra* at 648.

Alternatively, defendant argues that he was denied effective assistance of counsel by trial counsel's failure to object to the instructions as given or to request the instruction on non-deadly force in self-defense. We decline to review this argument because it was not identified in defendant's statement of questions presented. MCR 7.212(C)(5); *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992). In any case, we are satisfied that defendant is not entitled to relief regarding this claim. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

Defendant next argues the trial court committed two evidentiary errors which require reversal. We disagree as to both issues. Whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). Reversal may not be predicated on an erroneous evidentiary ruling unless a substantial right was affected. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993).

There is no merit to defendant's claim that, when the trial court precluded testimony by inmate Jones about the availability of weapons in prison, defendant was denied his right to present a defense. Defendant testified that Rodriguez had a weapon and that defendant was afraid. However, Jones did not see Rodriguez with a weapon and testified that he had never actually seen an inmate with a weapon. Thus, Jones' testimony was not relevant to whether defendant honestly and reasonably believed Rodriguez would kill or seriously injure him at the time of the incident. Therefore, testimony regarding the availability of weapons in prison was properly excluded and defendant was not denied his right to present a defense.

Nor did the trial court err when it admitted evidence of an out-of-court statement of another inmate. Here, the alleged hearsay was Rodriguez' testimony of statements made to him by Garcia indicating that defendant had a weapon. The testimony was offered to show the effect of the statements on Rodriguez and his subsequent actions in response to the statements, namely, walking toward a prison guard. Such a statement, offered to show the effect of the statement on the hearer, is not hearsay and was properly admitted. *People v Flaherty*, 165 Mich App 113, 122-123; 418 NW2d 695 (1987); *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986). Further, the trial court gave a cautionary instruction concerning the proper use of the challenged testimony.

In addition, the evidence that defendant had a weapon was clearly established during trial by defendant's own testimony on direct examination. Therefore, Rodriguez' testimony was cumulative and any evidentiary error on this issue would be harmless beyond a reasonable doubt. *Flaherty, supra* at 165 Mich App 123.

Affirmed.

/s/ William B. Murphy  
/s/ Roman S. Gibbs  
/s/ Hilda R. Gage